

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

TERRANCE LOWDERMILK v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 262238 Stephen M. Bevil, Judge

No. E2007-00177-CCA-R3-HC - Filed October 1, 2008

The petitioner, Terrance Lowdermilk, appeals the dismissal of his petition for writ of habeas corpus in the Hamilton County Criminal Court. The state has moved this court to affirm the order by memorandum opinion pursuant to Tennessee Court of Criminal Appeals Rule 20. The petition presents no cognizable ground for habeas corpus relief. Accordingly, we sustain the state's motion and affirm the order pursuant to Rule 20.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Terrance Lowdermilk, Federal Correctional Institution, Edgefield, South Carolina, Pro se.

Robert E. Cooper, Attorney General and Reporter; Lacy Wilber, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

According to the petitioner, he was convicted following a jury trial of aggravated assault and sentenced to six years.¹ Judgment was entered in June 1993. No direct appeal was taken. In December 2006, the petitioner sought habeas corpus relief from his conviction. He alleged that his trial counsel was ineffective and that the trial court impermissibly enhanced his sentence in violation of his Sixth Amendment right to jury trial, thereby rendering the judgment void. The trial court dismissed the petition upon finding that it lacked jurisdiction in the matter. The trial court observed that the petitioner's affidavit submitted in support of his petition showed that at the time he filed his petition, the petitioner was an inmate in federal custody who was no longer being restrained as the direct result of his expired 1993 Tennessee sentence. The trial court further found that even if it had jurisdiction, the petitioner had failed to present a cognizable claim for relief. In this regard, the trial court found that neither the Blakely-based claim of an

¹The petitioner has failed to include a copy of the challenged judgment.

improperly enhanced sentence² nor the claim of ineffective assistance of counsel were appropriate in a habeas corpus proceeding. The instant appeal followed.

In this state, the grounds upon which habeas corpus relief may be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). The writ will issue only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The purpose of the habeas corpus petition is to contest a void, not merely a voidable, judgment. State ex rel Newsome v. Henderson, 424 S.W.2d 186, 189 (1969). In this case, the limited record indicates that although the challenged sentence has expired, it is not the direct cause of the petitioner's restraint. Rather, it appears that the petitioner is incarcerated as a result of his guilty-pleaded convictions to three federal drug offenses for which he was sentenced to 151 months in federal prison in November 2002. That his federal sentence was enhanced as a result of his state convictions is a collateral consequence for which the writ provides no relief. "[W]hen the restraint on a petitioner's liberty is merely a collateral consequence of the challenged judgment, habeas corpus is not an appropriate avenue for seeking relief." See Hickman v. State, 153 S.W.3d 16, 23 (Tenn. 2004). Neither has the petitioner established a void judgment. As the trial court correctly found, neither his sentencing claim nor his claim of ineffective assistance would warrant habeas relief because, even if proven, these claims would render the judgment merely voidable, not void. See Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994)(holding that a claim of ineffective assistance of counsel would at most render a judgment voidable, not void); Ulysses Richardson v. State, No. W2006-01856-CCA-R3-PC, 2007 Tenn. Crim. App. LEXIS 410, at *9-10 (Tenn. Crim. App. May 24, 2007), app. denied (Tenn. Sept. 17, 2007)(stating that "even a valid Blakely claim renders a conviction voidable, not void, and is thus non-cognizable in habeas corpus review."). Lastly, the petition may not be considered in the alternative as one seeking post-conviction relief because it was filed many years beyond the applicable statute of limitations.

The petitioner has failed to establish a claim that warrants issuance of the writ of habeas corpus. Accordingly, the trial court properly dismissed the petition and the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals. Costs on appeal are taxed to the state.

JAMES CURWOOD WITT, JR., JUDGE

² Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531 (2004) (holding unconstitutional a sentencing scheme that allowed judges, as opposed to a jury, to find "factors," other than the fact of a prior conviction, that increased a sentence beyond the maximum allowed by the jury findings alone).